> thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).[180]

10668 Briefs to the Administrative Law Judge

Briefs are particularly helpful following compliance hearings, especially where a detailed analysis and explanation of payroll, unemployment, and other financial documents introduced into evidence will assist the administrative law judge in understanding the General Counsel's theory of the case. Similar to unfair labor practice trials, briefs also are advisable where the case involves difficult credibility issues, a long record or complex issues or where legal argument may be helpful to the administrative law judge. General briefing guidelines are set forth in ULP Manual Section 10410. Sections 102.42 and 102.59, Rules and Regulations.

When filing a brief to the administrative law judge following a compliance hearing, consideration should be given to the following points:

- It may be helpful to include charts, tables, and graphs in the brief to summarize voluminous or complex payroll or other financial records introduced into evidence.
- If the General Counsel has advanced an alternative theory at the hearing, the alternative calculations should be set forth in the brief, together with argument and case law supporting this alternative theory.
- If an alternative theory for calculating backpay or the make whole remedy is raised at trial, and the theory appears to be of particular concern or interest to the administrative law judge, the alternative calculations associated with this theory should be set forth in the brief, together with the General Counsel's argument and case law supporting or opposing this alternative theory.
- All requested remedies must be clearly articulated, including any special remedies. Argument and case law supporting the remedies requested should be provided.

10670 Bankruptcy

10670.1 Overview

In processing cases in which a charged party or respondent has filed a bankruptcy petition, the Region should promptly determine what actions should be taken to protect the Agency's interests in the bankruptcy proceeding and should thereafter become actively involved in the bankruptcy proceeding in order to maximize the opportunity for the Agency to obtain a recovery on its claim.

[180] See also *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968), enfg. 153 NLRB 1575 (1965); *Corning Glass Works v. NLRB*, 129 F.2d 967, 973 (2d Cir. 1942).

The Bankruptcy Code (Title 11, U.S.C.) is a Federal statute that permits an employer, whether a corporation, partnership, or sole proprietorship, to file a petition for bankruptcy. The possible venues for the filing of a bankruptcy case include where a company principally does business, where a company retains its principal assets, and where a company has its domicile or is incorporated.

The Supreme Court, in the *Nathanson* case, concluded that the Board is a creditor of a debtor in a bankruptcy case with respect to unpaid backpay awards.[181]

The Board is the only entity that has a right to file such claims[182] and the Board is the sole authority to liquidate its backpay claims.[183]

As a creditor, the Board's right to collect monetary relief from a debtor is affected by bankruptcy proceedings. It is therefore the responsibility of the Region to become aware of the existence of a bankruptcy case involving a charged party/respondent to thereafter timely file a Proof of Claim with the bankruptcy court and, as set forth below, with consultation as appropriate with the Contempt Litigation & Compliance Branch and/or the Special Litigation Branch, to take all other appropriate action to protect the Board's jurisdiction and its right to collect monetary relief from the debtor.

The general legal principles and basic rules governing the filing of Agency claims are summarized below in Section 10670.4. Sources for learning about the pendency of a bankruptcy case are summarized in Section 10670.3(a).

Agency unfair labor practice proceedings are administrative regulatory proceedings exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).[184] This is true whether the charged party/respondent is in bankruptcy under Chapter 11 or Chapter 7 of the Code.[185] Moreover, bankruptcy courts do not have jurisdiction under 28 U.S.C. § 1334 or 11 U.S.C. § 105 to impose a discretionary injunction on the Agency.[186] Additionally, the courts have found that neither the cost of litigation before the Agency, nor the potential for a backpay claim against the estate, constitute a "threat to the assets of the estate" so as to warrant a discretionary injunction.[187] The Special Litigation Branch should promptly be advised of the filing of any injunction proceedings against the Agency and any injunction pleadings should be provided as soon as possible.

See Appendix 18 for a sample letter that provides case authority and argument in support of the position that Agency proceedings are not stayed by the filing of a bankruptcy petition.

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[181] *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). See also *Tucson Yellow Cab v. NLRB*, 27 B.R. 621, 623 (Bankr. 9th Cir. 1983); *NLRB v. Killoren*, 122 F.2d 609, 613 (8th Cir. 1941).

[182] *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 265 (1940); *Nathanson*, supra; *In re Matter of Nicholas, Inc.*, 55 B.R. 212, 215 (Bankr. D. N.J. 1985); *In re Adams Delivery Service*, 24 B.R. 589, 592 (Bankr. 9th Cir. 1982); *In re Brada Miller Freight Systems*, 16 B.R. 1002, 1008 (N.D. Ala. 1981); *NLRB v. P.I.E. Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991).

[183] *Nathanson*, supra; *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980); *Tucson Yellow Cab*, supra at 623. Under Code Section 502 of the Bankruptcy Code, however, bankruptcy courts may undertake to estimate the amount of claims, including Board claims, if the liquidation of the claim by the Board would unduly delay the administration of the bankruptcy case. See Section 10670.4(d) for further discussion of this issue.

[184] *NLRB v. P.I.E. Nationwide, Inc.*, supra at 512; *NLRB v. Continental Hagen Corp.*, supra at 832–833, 834.

[185] Id.; see also *NLRB v. Twin Cities Electric*, 907 F.2d 108, 109 (9th Cir. 1990).

[186] *In re S.T.R. Corp.*, 66 B.R. 49, 51–52 (Bankr. N.D. Ohio 1986); *In re Caribe Inn*, 1989 WL 435473 (B.D.P.R. 1989). Cf. *Board of Governors v. MCorp Financial, Inc.*, 112 S.Ct. 459, 464–465 (1991).

[187] *Tucson Yellow Cab v. NLRB*, supra, 27 B.R. at 623; *In re Nicholas, Inc.*, 55 B.R. 212, 217 (Bankr. D.N.J. 1985); *In re Rath Packing Co.*, 38 B.R. 552, 562–563 fn. 6 (Bankr. N.D. Iowa 1984); *In re Brada Miller Freight Systems*, supra, 16 B.R. at 1007, 1012; *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325–327 (8th Cir. 1986).

As part of the bankruptcy process, debtors can accept or reject executory contracts, including collective-bargaining agreements.

In Chapter 11 cases, collective-bargaining agreements can be rejected only if the debtor meets the requirements of Section 1113 of the Code. These requirements include what may be described as good-faith bargaining with the union regarding the debtor's proposed changes in the terms of the collective-bargaining agreement. The debtor is required to bargain in good faith with the union about any changes that go beyond the scope of the Court approved changes. *Crest Litho, Inc.*, 308 NLRB 108 (1992).

In Chapter 7 liquidation cases, collective-bargaining agreements are subject to rejection under Section 365(d)(1). If the bankruptcy trustee does not accept or reject the contract within 60 days after the order for relief, the contract is deemed rejected retroactive to the petition date. In voluntary bankruptcy cases, the order for relief is the filing of the petition.

10670.2 Assistance With Bankruptcy Issues

Every Region should appoint a bankruptcy coordinator who is responsible to provide assistance to Region staff regarding bankruptcy issues. The responsibilities of the bankruptcy coordinator include processing information about a possible bankruptcy filing, determining whether a bankruptcy petition has been filed, reviewing bankruptcy pleadings and recommending or deciding what course of action the Region should take in response to a bankruptcy pleading.

Regions should contact the Contempt Litigation & Compliance Branch or the Special Litigation Branch for assistance with bankruptcy issues. Each branch is responsible for handling certain types of bankruptcy issues. If the Region is not sure which branch has jurisdiction over a particular matter, contact either branch for assistance. Set forth below is a list of the division of bankruptcy responsibilities between the respective branches.

Contempt Litigation & Compliance Branch:

- Section 363 "free and clear" sales,
- all asset-hiding cases including piercing the corporate veil, objections to discharge under Section 523, 727, and other Code sections, discovery involving alter egos/single employers, sources of backpay, and objections to the homestead exemption,
- issues concerning voluntary or involuntary conversion from Chapter 11 to Chapter 7,
- issues requiring the debtor to make proper distributions under the bankruptcy plan,
- objections to disclosure statements and plans based on financial criteria (for example, inadequate financial data, challenges to feasibility of plans, and inequitable distributions in plans),
- offensive use of equitable subordination under Section 510.

Special Litigation Branch:

- threats or efforts to enjoin or stay unfair labor practice, compliance, and representation cases (for example, Code Section 362 automatic stay and Code Section 105 "inherent power" injunction),
- Code Section 1113 rejection of collective-bargaining agreement issues that involve Agency jurisdiction (for example, retroactive rejection),
- objections to the Agency's claim,
- estimation proceedings under Code Section 502(c),
- objections to disclosure statements and plans which implicate the Agency's jurisdiction (for example, where a plan or disclosure statement effectively determines liability under the NLRA and liquidates the Agency's claim), or provides the bankruptcy court authority to enjoin proceedings against the reorganized debtor or to determine or liquidate liability of the debtor after confirmation of the plan.

Before participating in person in any bankruptcy court hearing or before filing a pleading in any contested or adversary proceeding in bankruptcy court, the Region should promptly submit the matter to the Contempt Litigation & Compliance Branch or the Special Litigation Branch, as appropriate. Contested or adversary proceedings would include, for example, situations where the Region intends to file:

- an objection or opposition to a complaint or motion for sale of property or other relief,
- an objection or opposition to a proposed Disclosure Statement or Plan of Reorganization,
- an objection to discharge of the debtor,
- a request for relief (other than a Proof of Claim/Application for Administrative Expense) to which the Region anticipates the debtor, trustee, or other creditors will object.

See Federal Rules of Bankruptcy Procedures 7001 and 9014 for a listing of Adversary Proceedings and Contested Matters.

The Region should assure that its legal staff is certified to file documents electronically with the bankruptcy courts located in the Region's geographic jurisdiction.

10670.3 Regional Office Procedures to Protect the Agency's Interests in a Bankruptcy Proceeding

10670.3(a) Identification and Processing of Cases Involving a Charged Party/Respondent in Bankruptcy

Regions should utilize various resources to determine whether a charged party/respondent is the subject of a bankruptcy proceeding. These resources include the parties and witnesses in an unfair labor practice case, the unfair labor practice charge,

newspapers and business journals, Regional staff members, and electronic sources of information utilized by the Agency such as PACER.

Once a Region receives notice that a charged party/respondent is in bankruptcy, high priority should be given to promptly analyzing the case to determine whether there is a reasonable possibility of obtaining a remedy through the bankruptcy case and to determine what action needs to be taken in the bankruptcy case to protect the Agency's interests. If there is a reasonable possibility of obtaining a remedy through the bankruptcy case, the case should be categorized as Category III. See Section 10694.2 regarding the factors the Region should consider when classifying cases in which bankruptcy petitions have been filed. If a court judgment has been entered in a case, the Region should notify the Contempt Litigation & Compliance Branch regarding cases in which the charged party/respondent is liquidating its assets in bankruptcy and the Region concludes that further proceedings would not effectuate the Act.

If a respondent files a bankruptcy petition, the Region should schedule unfair labor practice or supplemental compliance proceedings for the earliest possible date and advise the chief administrative law judge of the pending bankruptcy proceedings. It may also be appropriate to issue a compliance specification and litigate those issues at the same time as the unfair labor practice proceeding.

In Section 10670.4(e) below, various claim priorities are set forth. Backpay specifications should be drafted with sufficient detail to enable the administrative law judge and the Board to particularize the award in a manner that allows for the claiming of these priorities.

The Region should serve the bankruptcy case trustee with copies of all formal documents in the unfair labor practice or supplemental compliance proceeding. The trustee should not be named as a party respondent for the first time in a compliance proceeding. Unless the trustee directed unlawful conduct or was directing the debtor's business when the unfair labor practice occurred, the trustee should not be named as respondent in the underlying unfair labor practice proceeding.

In those cases where a complaint will issue or has issued against an individual or corporation that has been granted a discharge by a bankruptcy court, or against a corporation or partnership that is owned or operated by an individual that has been discharged in bankruptcy, the Region should consider the following bankruptcy principles:

Debts of individuals (11 U.S.C. § 727(a)(1)) and debts of reorganized entities are dischargeable by confirmation of a plan of reorganization (11 U.S.C. § 1141(d)). The Bankruptcy Code voids any judgment and enjoins the enforcement of any judgment on a debt that has been discharged. 11 U.S.C. § 524(a)(1) and (2). Thus, the Agency cannot seek to hold either individuals who have received a discharge or entities that have a confirmed plan liable for monetary obligations arising prepetition or prior to confirmation of a plan of reorganization, as a result of unfair labor practices. The pursuit of such a monetary obligation through the issuance of a complaint, compliance, or any other proceedings after the discharge in bankruptcy may result in the Agency being enjoined or held in contempt of court.

Because corporations and partnerships are not discharged through liquidations conducted in Chapter 11 or Chapter 7, there is no prohibition in the Bankruptcy Code against issuing or prosecuting a complaint which seeks to hold these entities liable for obligations or remedies under the National Labor Relations Act.

Cases in which the Region has issued a complaint or is considering issuing a complaint against an individual or entity discharged in bankruptcy should be submitted to the Division of Advice and the Special Litigation Branch. Where a court judgment or bankruptcy nondischargeability order has issued, a copy of the submission should also be forwarded to the Contempt Litigation & Compliance Branch. When recommending enforcement proceedings against a respondent that is liquidating its operations in a bankruptcy proceeding, the Region should specifically note this information in its submission for enforcement.

Regions should notify the Division of Operations-Management where a charged party/respondent corporation or partnership has been liquidated in bankruptcy and the Region intends to commence or continue the prosecution of the unfair labor practice case.

10670.3(b) Monitor the Progress of a Bankruptcy Case

The Region should monitor the progress of bankruptcy cases involving a charged party/respondent by reviewing bankruptcy pleadings as well as Chapter 11 monthly financial reports that are filed with the U.S. Trustee's Office. The Region may receive copies of such pleadings and reports by mail or by electronic means in jurisdictions that require electronic filing of documents. The Region should also monitor the progress of bankruptcy cases by use of electronic sources of information utilized by the Agency, including PACER, as well as the U.S. Courts website. The website address for PACER is www.pacer.psc.uscourts.gov/cgi-bin/links.pl and the website address for the U.S. Courts is www.uscourts.gov/links.html.

The Region should continue to monitor the progress of a bankruptcy case and take other appropriate action to protect the Agency's interests in the bankruptcy proceeding unless the Region determines that there is no reasonable opportunity to obtain a backpay remedy in the bankruptcy proceeding.

10670.3(c) Timely File a Proof of Claim

Proofs of claim should normally be filed as soon as possible after the Region has determined that the charge is meritorious and has issued complaint. However, when the time for filing the claim may expire before the determination of the merits of the charge, a Proof of Claim should be filed within the time allowed under the appropriate limitations provision set forth at Section 10670.4(c), attaching a copy of the charge and a brief statement regarding the basis for the Agency's claim. Where interim earnings are unknown or calculation of backpay would cause undue delay, the claim may be filed without such information or calculation, but with a brief statement that such specific dollar amounts will be included when the claim is amended at a later date.

The principles and rules set forth at Section 10670.4 should be followed in preparing the Agency's claim.

If a notice is issued in the bankruptcy proceeding which instructs creditors not to file claims because the case is a no-asset case, the Region may wait to file a Proof of Claim until such time as a notice is issued instructing creditors to file claims.

When there is an appeal of the dismissal of a charge involving a charged party in bankruptcy, the Region should telephonically request the Director of the Office of Appeals to expedite the appeal process. If the Region learns that the appeal cannot be decided within the period allowed for the filing of proofs of claims, the Region should file a protective Proof of Claim, noting in the claim that it will be withdrawn if the charge is finally dismissed.

10670.3(d) File Appropriate Notices With the Bankruptcy Court

The Region should file in the bankruptcy court and serve on the debtor and debtor's counsel (and the trustee where one has been appointed) (1) a notice of appearance and request for notice, (2) a notice of pendency of unfair labor practice proceeding, and (3) a request for a disclosure statement and plan of reorganization under Bankruptcy Rule 3017(a). The first and second are filed in all cases, while the third is only filed in Chapter 11 cases.

See Appendix 19 for a sample notice of appearance and request for notice, Appendix 20 for a sample notice of pendency of unfair labor practice proceeding and Appendix 21 for a sample request for disclosure statement and plan.

The notice of pendency of unfair labor practice proceeding should include a copy of the complaint and any administrative law judge, Board, or court decision.

10670.3(e) Review Bankruptcy Pleadings and Utilize Procedures Under the Bankruptcy Code to Determine If There Are Sufficient Assets to Pay the Agency's Claim

The Region should promptly and fully review bankruptcy filings and pleadings, including the debtor's bankruptcy petition and the various schedules filed by the debtor pursuant to Bankruptcy Rule 1007, to determine the amount of assets available to pay claims.

Section 341 of the Bankruptcy Code and Bankruptcy Rule 2003 provide that the U.S. Trustee or a designee presides at a meeting of creditors with the debtor. This is called the Section 341 or the first meeting of creditors, and is generally scheduled to occur about 20 to 40 days after the filing of the bankruptcy petition. A Regional representative should attend the Section 341/first meeting of creditors and, as appropriate, conduct an examination of the debtor. It is not necessary that the Regional representative at the creditors meeting be an attorney. (Section 341(c).)

Bankruptcy Rule 2004 provides that, on motion of any party in interest, the court may order the examination of any entity. In some jurisdictions creditors are permitted to initiate such an examination by the filing of a notice of such examination with the bankruptcy court. Since Code Section 341 meetings are generally fairly brief, a Section 2004 examination of the debtor may be necessary to have sufficient time to fully examine the debtor. The Region should conduct Bankruptcy Rule 2004 examinations as appropriate.

The scope of permissible examination of a debtor under Section 2004 or at the Section 341 meeting of creditors is very broad. For example, it may relate to the acts, conduct or property of the debtor, the liabilities and financial condition of the debtor, any matter that may affect the administration of the debtor's estate, and the debtor's right to a discharge. Sample motions to secure a court-ordered Section 2004 examination are located at the Special Litigation and Contempt Litigation & Compliance Branch sites on the intranet.

10670.3(f) File Appropriate Objections With the Bankruptcy Court

Nondischargeable Agency Claims: Although the debts of individual debtors are generally dischargeable under the Bankruptcy Code, certain debts can become non-dischargeable under Code Section 523. Thus, individual debtors have been precluded from obtaining a discharge of their debts based on their violations of Section 8(a)(3) and (5). See OM 94-20, OM 97-37, OM 03-05, In re Fogerty, 153 LRRM 3038 (Bankr. N.D. Ill. 1996); and In re Piper, 170 LRRM 2282 (Bankr. E.D. Mich. 2002).

The time for filing a nondischargeability complaint under Code Section 523 in a Chapter 7 or 11 case is no later than 60 days after the first date set for the first meeting of creditors under Section 341 (Bankruptcy Rule 4007). In a Chapter 7 or 11 case, the first meeting of creditors is normally held within 20 to 40 days after the filing of the petition (Bankruptcy Rule 2003).

Regions are reminded that the initiation of all nondischargeability actions under Section 523 must first be cleared with the Contempt Litigation & Compliance Branch.

Objections to Discharge Not Premised Upon Unfair Labor Practice Conduct: If an individual debtor engages in certain misconduct relating to the bankruptcy case, such as concealing information from creditors and the court or knowingly and fraudulently making a false oath or account, the debtor may be precluded from obtaining a discharge (Code Section 727).

A complaint objecting to the discharge of an individual debtor based on the debtor's actions must be filed in a Chapter 7 case no later than 60 days after the first date set for the first meeting of creditors under Section 341 (Bankruptcy Rule 4004). In a Chapter 11 reorganization case, such a complaint objecting to discharge must be filed prior to the first date set for the hearing on confirmation of the plan (Bankruptcy Rule 4004). There is no discharge for Chapter 11 debtors who are liquidating their assets.

Regions are reminded that the initiation of all nondischargeability actions under Section 727 must first be cleared with the Contempt Litigation & Compliance Branch.

Objections to Free and Clear Sales: If the business of the debtor is sold during the bankruptcy case as part of a court-approved free and clear sale, then the Agency may be precluded from thereafter obtaining any *Golden State Bottling* remedy from the successor.

While the Board has held that the Board's backpay award is not extinguished by a free and clear sale, *International Technical Products Corp.*, 249 NLRB 1301 (1980), Regions should not rely upon this case as a basis for failing to object to a free and clear sale.

The Contempt Litigation & Compliance Branch should be notified immediately of any proposal to sell the debtor assets "free and clear" of encumbrances.

Objections to Disclosure Statements and Plans of Reorganization: In a Chapter 11 case, the disclosure statement is the primary source of information about a plan of reorganization (or plan of liquidation) and its impact upon the creditors. Code Section 1125 requires adequate disclosure before solicitation of acceptances of a proposed plan. The disclosure statement should contain information about the debtor and its assets, as well as a projection of future earnings and financial soundness. The Region should evaluate whether the Agency's claim, including the priorities asserted, are accurately represented in the disclosure statement and whether sufficient additional information is provided to judge the feasibility of the debtor surviving after confirmation of a plan of reorganization.

The remedy for the debtor's failure to provide adequate information in the disclosure statement is for the debtor to amend the statement. The Agency's participation in the amendment process is helpful to ensure that the debtor knows the Agency's concerns regarding the statement and plan, to help prepare a foundation for an objection to the plan and, hopefully, to commence a dialogue with the debtor which can lead to settlement of the Agency's concerns.

On receipt of a disclosure statement and proposed plan, the Region should determine deadlines for objections to each and decide whether the disclosure statement properly describes the Agency's claim and contains information adequate to make a decision on whether to object to the plan.

In small business cases, defined as businesses with debts of $2 million or less, not including debts owed to affiliates and insiders, the bankruptcy court may determine that the plan itself provides adequate information and a separate disclosure statement is not necessary (Code Sections 101(51C), 101(51D), 1125(f)(1)).

In a Chapter 11 case, the plan of reorganization or plan of liquidation defines how each creditor group will be treated after confirmation. It is important for the Agency's claim to be properly classified and treated in the plan because the plan defines how the estate will be distributed and, if there is a reorganization, the order confirming a plan will discharge corporate, partnership, and individual debtor's preconfirmation liabilities. The plan should be reviewed as to the requirements listed in 11 U.S.C. § 1129 (including whether similar claims are classified and treated the same, whether priority claims are properly treated and whether a reorganization is financially feasible). The plan also needs to be carefully reviewed with regard to filing an objection to any provision that gives the court jurisdiction or authority to enjoin actions against the debtor, to determine and liquidate claims against the debtor, or otherwise to frustrate the Agency's ability to conclude its proceedings.

Regions should consult with the Special Litigation Branch or the Contempt Litigation & Compliance Branch regarding any questions they may have concerning disclosure statements and plans of reorganization. (Section 10670.2.) If the Region determines that it is necessary to file an objection, it should submit the matter to the appropriate branch.

10670.4 The Preparation and Filing of a Proof of Claim

10670.4(a) General Principles

All claims should be timely filed. A claim, other than an administrative claim, is filed by completing and timely filing the Proof of Claim form. The Proof of Claim form can be found on the web page of most Bankruptcy Courts.

The two basic elements of a claim that must be filled out are the amount of the claim and the priority of the claim, if any, as determined under the Bankruptcy Code. A statement should be included with the Proof of Claim form explaining the amount and priorities of the Agency's claim. The statement should also explain the basis for the Agency's claim and reference attached copies of any settlement, complaint, and decision issued by an administrative law judge, the Agency, and the circuit court.

Social security numbers for backpay claimants should generally not be included in a Proof of Claim or other bankruptcy pleading. To the extent that it is necessary to identify backpay claimants by social security numbers in any such document, only the last 4 digits of the social security numbers should be used.

Once a Proof of Claim is filed, the Agency's claim is deemed allowed unless an objection to the claim is filed by any party in interest. 11 U.S.C. § 502(a). The objection must be mailed to the Agency at least 30 days prior to the hearing on the objection. Bankruptcy Rule 3007. The Region should check the local bankruptcy rules to determine the due date for the Agency's response to the objection. Upon receipt of an objection to the Agency's claim, the Region should immediately submit a copy of the objection to the Special Litigation Branch for preparation of the Agency's response.

10670.4(b) Duplicate Claims

The Supreme Court concluded in the *Nathanson* case that the Board is the appropriate entity that has standing to file a claim based upon an unfair labor practice violation.[188] The Region should therefore normally file a Proof of Claim based upon the debtor's unfair labor practices even if another party has filed a claim that arguably duplicates part of the Agency's claim and even if the case has been deferred to the parties' arbitration process.

If the unfair labor practice proceeding only involves the issue of the failure to make wage payments or fund contributions pursuant to a collective-bargaining agreement, the Region should not file or pursue a claim for such payments if the union or the particular fund has or will timely file a Proof of Claim. However, if the Region determines that such a claim will not be timely filed by the union or the particular fund, the Region should timely file a claim relating to such payments or contributions. Section 10670.3(c).

10670.4(c) Deadline to File the Agency's Claim

In Chapter 11 cases, the court will set a bar date for filing claims. Bankruptcy Rule 3003(c)(3). This is sometimes done in the order setting the date for the first meeting of creditors.

[188] *Nathanson v. NLRB*, 344 U.S. 25 (1952).

The bar date for filing claims in Chapter 7 and 13 cases for Governmental units such as the Agency is 180 days after the date of the order for relief (Bankruptcy Rule 3002(c)(1)). The filing of the bankruptcy petition by the debtor constitutes the order for relief (Code Section 301). In some Chapter 7 and 13 cases, the court will send a notice pursuant to Rule 2002(e) that creditors do not have to file a Proof of Claim because there are no apparent assets in the estate. If the Region subsequently receives a notice from the Bankruptcy Court that the case has become an asset case, the Region must file a claim within 90 days after the clerk has mailed the notice that the case has become an asset case (Bankruptcy Rule 3002(c)(5)).

The Agency should file its Proof of Claim for nonadministrative claims before the bar date for filing claims. Administrative claims are filed by filing an application for allowance and payment of the administrative claim with the Bankruptcy Court. There will be a separate later bar date set by the court for filing administrative claims. If the Region determines that the bar date has passed before a claim is filed, consult the Special Litigation Branch regarding whether a claim should still be filed.

10670.4(d) The Amount of the Agency's Claim

The Agency is the sole authority to liquidate the amount of backpay claims.[189]

Under Code Section 507(a)(4), however, Bankruptcy Courts have the authority to estimate the amount of claims, including Agency claims, if the liquidation of the claim would unduly delay the administration of the case.

If there is a motion to estimate the Agency's claim, the Region should immediately submit a copy of such motion to the Special Litigation Branch for preparation of the Agency's response to such motion. The Agency should object to the court's estimating the Agency's claim to avoid the court's setting a limit on the amount for distribution.

The dollar amounts listed on the Proof of Claim form can be estimates based on the information provided to the Region during the investigation. Such a situation may arise where a Proof of Claim is filed without a review of the debtor's records or in the absence of interim earnings information from backpay claimants. If estimated dollar amounts are included in a claim, the statement attached to the Proof of Claim (Section 10670.4(a)) should note this fact. The statement should further note that the claim will be amended, if necessary, upon receipt of additional information by the Region.

Interest on a backpay award is allowed in Chapter 7, 11, and 13 cases. As a practical matter, the amount of interest for which any priority can be claimed will often be very minimal and may be time consuming to calculate.

Interest which accrues prepetition and is calculated based on prepetition backpay that is not entitled to priority can be claimed only as an unsecured claim with no priority.

Interest which (a) accrues during periods corresponding to the wage or fringe benefit priority period, (b) is based on backpay that accrued during the Code Section 507(a)(4) priority period or fringe benefit fund payments that accrued during the Code Section 507(a)(5) priority period, and (c) when added to the amounts claimed under Code

[189] Id.

Sections 507(a)(4) and/or 507(a)(5) does not exceed the current $10,000 per employee limit, can be claimed as a priority under Sections 507(a)(4) or 507(a)(5), as appropriate.[190] Any amounts in excess of the $10,000 limit per employee must be claimed as an unsecured claim with no priority.

Interest which accrues postpetition, regardless of the priority claimed for the principal backpay amount, can only be claimed as a separate amount with no priority for distribution pursuant to 11 U.S.C. § 726(a)(5) of the Code. Under this Code section, interest accruing postpetition is distributed only if there are estate assets remaining after all other claims (including general unsecured claims) are paid and there is money remaining that would be distributed back to the debtor or the owners of the estate. This rule for postpetition interest has been applied in cases of reorganization and liquidation under Chapters 7, 11, and 13.[191]

10670.4(e) Classification of the Agency's Claim

The Agency's claim may be classified, in whole or in part, as a secured claim, an unsecured claim with priority, or as an unsecured claim without priority.

The Agency has a secured claim if the Agency has a lien against the debtor's property. Such a lien could be based upon security that has been recorded regarding the debtor's property or a money judgment against the debtor that has been recorded as a judgment lien.

Any part of a claim that is not a secured claim is an unsecured claim. If the Agency's claim is unsecured it may have one or more of the following priorities:[192]

Second (administrative) priority. Where the bankruptcy petition was filed on or after October 17, 2005, backpay which accrues subsequent to the filing of the bankruptcy petition is claimed as an administrative expense under 11 U.S.C. § 503(b)(1)(A)(ii) and entitled to a second priority under 11 U.S.C. § 507(a)(2). Administrative priority in such cases will be allowed if the bankruptcy court determines that payment of such wages and benefits will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations, during the case.[193]

Backpay which accrued subsequent to the filing of a bankruptcy petition which was filed before October 17, 2005 should be claimed in most jurisdictions as an administrative expense under 11 U.S.C. § 503(b)(1)(A) and is entitled to administrative priority under 11 U.S.C. § 507(a)(1).[194]

In the Ninth Circuit and in certain other jurisdictions, for bankruptcy cases that were filed prior to October 17, 2005, the Region should not claim administrative priority

[190] Senate Report 95-989, July 14, 1978, explains that under 11 U.S.C. § 726(a)(5), "interest accrued on all claims . . . which accrued before the date of the filing of the title 11 petition is to be paid in the same order of distribution of the estate's assets as the principal amount of the related claims."

[191] *In re Adcom, Inc.*, 89 B.R. 2 (D. Mass. 1988); *In re Riverside-Linden*, 945 F.2d 320, 323–324 (9th Cir. 1991); *In re San Joaquin Estates*, 64 B.R. 534 (Bankr. 9th Cir. 1986); *In re Beguelin*, 220 B.R. 94, 98–99 (9th Cir. BAP 1998).

[192] Effective for all bankruptcy cases filed on or after October 17, 2005, Section 507 is amended to add Section 507(a)(1) concerning claims for certain domestic support obligations. The designation of other sections under Section 507 is changed accordingly with former Section 507(a)(1) becoming Section 507(a)(2), and so forth.

[193] Code § 503, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, Pub. L. No. 109-8, 119 Stat. 23.

[194] *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980) (postpetition ULP); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983) (same); and *In re Brinke*, 135 LRRM 2769 (Bankr. D. N.J. 1989), affd. 135 LRRM 2800 (D.N.J. 1989) (prepetition ULP, postpetition accruing backpay).

for backpay accruing postpetition where the unfair labor practice was committed prepetition.[195]

Sample administrative claim pleadings are available on the intranet under Enforcement Litigation/Special Litigation/Bankruptcy-Memos and Sample Pleadings.

Third (gap period) priority. In involuntary bankruptcy cases (cases where a party other than the debtor files the petition), backpay that accrues between the filing of the petition and the earlier of two events—the appointment of a trustee or the issuance of an order for relief-is entitled to third priority. 11 U.S.C. § 507(a)(3).

Fourth (wage claim) priority. Any backpay liability (excluding backpay amounts owed to employee benefit plans), up to a current maximum amount per employee of $10,000, that accrues during the 180 days prior to the filing of the petition or 180 days before the debtor ceases business, whichever occurs first, is entitled to fourth priority. 11 U.S.C. § 507(a)(4).[196] The current statutory amount and accrual period applies to cases that commenced on or after April 20, 2005, and is periodically adjusted to reflect changes in the cost of living.[197] If the loss that accrued during the 180-day period exceeds the statutory maximum allowed per employee, the excess amount is treated as an unsecured nonpriority claim.

Fifth (benefit fund) priority. Backpay representing unpaid contributions to employee benefit plans (such as pension funds and health and welfare funds), which accrued within 180 days prior to the filing of the bankruptcy petition (or the date that the debtor ceased operation, whichever occurred first), is entitled to a fifth priority to the extent that when added to the fourth priority amount the total amount does not exceed the statutory maximum allowed per employee. 11 U.S.C. § 507(a)(5). See footnote 194. Amounts in excess of the statutory maximum allowed per employee are treated as unsecured nonpriority claims.

To the extent an unsecured claim does not have priority, it is an unsecured non-priority claim (typically referred to as a "general unsecured claim").

10670.5 Obtaining Successful Results in Bankruptcy Cases

The Region should actively participate in bankruptcy cases to increase the chances of recovery on the Agency's claim. The Region should negotiate a settlement of the Agency's claim with the appropriate parties, including:

- The Case Trustee, if a Trustee has been appointed. If counsel for the Trustee has been appointed, the Region should deal with counsel for the Trustee, rather than the Trustee. A Case Trustee is appointed in all Chapter 7 bankruptcy cases, but rarely in Chapter 11 cases. (The U.S. Trustee's office does not itself actively administer individual cases, but may be contacted for

[195] *NLRB v. Walsh (In re Palau Corp.)*, 18 F.3d 746 (9th Cir. 1994); *Kapernekas v. Continental Airlines (In re Continental Airlines)*, 148 B.R. 207 (D. Del. 1992).

[196] For bankruptcy cases that commenced prior to April 20, 2005, the time period is 90 days rather than 180 days.

[197] The relevant dollar amounts to be applied as wage priority under Code Section 507(a)(4) (formerly 507(a)(3)) and for fund priority payments under Section 507(a)(5) (formerly 507(a)(4)) are as follows: for cases commenced on or after April 20, 2005—$10,000; for cases commenced between April 1, 2004 and April 19, 2005—$4925; for cases commenced prior to April 1, 2004—$4650.

assistance when it appears that there is abuse of the bankruptcy process or that the case is not being appropriately administered.)

- Counsel for the debtor, particularly if there is no appointed Case Trustee. The debtor's bankruptcy counsel is normally someone different from the attorney who represents the debtor in the unfair labor practice proceeding, and
- The Disbursing Agent, if the Agency's claim has not been resolved at the time a Disbursing Agent is appointed to disburse the estate assets pursuant to a plan.

The Region should also consider contacting counsel for the unsecured creditors committee, who can often provide the Agency with valuable information about a case.

The Region should inform the appropriate parties about the Agency's claim because trustees and other debtor representatives often have little or no knowledge about the Act. The Region should also send the Trustee or other debtor representative a copy of the Agency's Proof of Claim together with a letter explaining the basis for the claim.

10670.6 Settlement of the Agency's Claim

There is no requirement that the Region litigate the unfair labor practice case in order to pursue the Agency's claim. The claim can be settled as long as the Region has made a merit determination regarding the charge(s). Prior to attempting to negotiate a settlement of the Agency's claim, the Region should normally issue a complaint so the debtor, debtor's counsel, and the Trustee can better understand the factual and legal basis for the claim.

The Agency's claim in a bankruptcy proceeding can be settled by an agreement that is subject to bankruptcy court approval. Such an agreement should resolve both the amount and the priority of the Agency's claim.

The Agency's claim can be settled based upon a meritorious charge, a complaint, a settlement agreement, an ALJ decision, or a Board or court order.

The settlement document may be a formal or informal Agency settlement, or a stipulation in the bankruptcy proceeding, sometimes referred to as an "agreed entry."

A formal or informal Agency settlement agreement is an appropriate settlement document in a Chapter 11 reorganization case where the debtor is continuing to operate its business. Special language should be added to the settlement agreement because the employer is in bankruptcy. Sample language to be used can be found on the intranet under Forms/Unconverted Forms/SF4775 (Revised Settlement Form with Attachments, optional paragraph 8).

An agreed entry would be appropriate to settle the case if the debtor is out of business and has filed either a Chapter 7 or 11 case involving liquidation of all of the debtor's assets. An agreed entry on the Agency's claim, which is an agreement entered into by the debtor or the Trustee as well as the NLRB, sets forth the agreed amount and priority of the Agency's claim and is subject to approval by the Bankruptcy Court.

Prior to finalizing a settlement in a bankruptcy case, the Region should consult with the Contempt Litigation & Compliance Branch or the Special Litigation Branch regarding any situation where such approval would affect the Board's position in the pending bankruptcy proceeding or where the settlement involves any nontraditional backpay remedies.

10670.7 Payment of the Agency's Claim

In Chapter 7 cases and Chapter 11 liquidation cases the Agency's claim is normally paid after the Trustee/debtor-in-possession files the final report with the Bankruptcy Court. In Chapter 11 reorganization cases and Chapter 13 cases, the Agency's claim is paid at such time as is provided by the plan of reorganization/repayment plan.

The bankruptcy estate may pay the Agency's claim by issuing one check made payable to the National Labor Relations Board or by issuing individual checks to the discriminatees who are entitled to receive backpay based upon the Agency's claim. Because of the expense involved to the bankruptcy estate in issuing individual checks to discriminatees, trustees/debtors often want to issue a lump sum check to the Agency to pay the Agency's claim. The Region should submit such lump sum checks to the Finance Branch with appropriate information regarding the distribution of the backpay. Section 10580.3. Since the payment of the Agency's claim is often on a prorata basis, the Region should submit to the Finance Branch the prorata amounts to be received by each discriminatee. Sections 10586 and 10588.

If the Agency's claim is for backpay for employees as contrasted to fund contributions or payment of dues to a union, the debtor is also normally responsible to pay to the IRS the employer's matching FICA contribution (about 7 percent of the backpay amount received by each discriminatee).

If the issue regarding payment of the matching FICA contribution is not specifically addressed by the terms of the settlement, the responsibility for such payments remains with the estate. In such circumstances, the Finance Branch will not normally make any deduction for the employer's portion of FICA from the backpay distributed to discriminatees. The Finance Branch will inform the IRS that the debtor/respondent is responsible for such payments. As with any similar lump sum settlement situation where the Agency distributes the backpay, the Finance Branch will also prepare and send W-2 forms to each discriminatee who has received such a distribution. Section 10578.7.

If the Region is unable to locate some of the discriminatees who are entitled to backpay pursuant to the Agency's claim and a lump sum payment has been made to the Agency by the bankruptcy estate, then the undistributed funds may be able to be redistributed to the remaining discriminatees up to a year from the date of the Board's receipt of the backpay. Section 10588.

Some Chapter 11 plans of reorganization provide that money not claimed must be returned to the debtor. If the Region is concerned about locating discriminatees, the Region should seek an agreement with the debtor that the backpay for employees who cannot be located can be redistributed prorata to other employees owed backpay.

If the bankruptcy estate has issued individual checks to the discriminatees, the checks are normally valid for a very limited period of time (often 60 days or less from the date of issuance). When the checks are no longer valid, they should be returned to the Trustee/debtor with a request that new checks be issued and forwarded to the Region. If the Trustee/debtor refuses to issue new checks, the amount of the checks will probably be deposited in an escrow account with the Bankruptcy Court.

If backpay checks are deposited in such an escrow account, the Region should file a motion with the court for distribution of the backpay held in escrow. Such a motion will normally be filed after the discriminatees/heirs are located or it is determined that they cannot be located and the money should be redistributed to other previously located discriminatees (again, assuming that such previously located discriminatees have previously received a distribution of less than full backpay). The Region should consult with the Contempt Litigation & Compliance Branch regarding this type of situation.

10672 Protection of Agency's Interest, Collection of Monetary Judgments and Derivative Liability

10672.1 Pleading Appropriate Business or Union Entity

Although it is always important to properly state the full corporate name of the respondent in unfair labor practice litigation, it is particularly important that the proper corporate name is utilized in the caption when it is necessary to commence collection proceedings to enforce a liquidated backpay judgment. Failure to correctly name the respondent may seriously impede or nullify the effectiveness of collection actions under the Federal Debt Collection Procedures Act (FDCPA) (28 U.S.C. §§ 3001–3307). Accordingly, Regions should check with corporation division officials at the appropriate Secretary of State office, either electronically using the intranet or database search service (AutoTrak), or telephonically, before submitting a supplemental backpay order for enforcement. The Regions should also periodically check with state corporation officials to determine the continued existence or change in name, of corporate respondents.

The same holds true for partnerships and sole proprietorships. Care should be used in fully naming the partnership and its general and managing partners. Partnership records, like corporate records, may be obtained from the appropriate Secretary of State office. For sole proprietorships, both the full trade name (including all "doing business as" designations) and the name of the owner of the business should be accurately stated in the caption.[198]

10674 Prejudgment Protection of Respondent's Assets From Sale, Transfer, Fraudulent Conveyance, or Dissipation of Respondent's Assets

10674.1 Overview

When financial liability is asserted and there is reason to believe the Agency's ability to collect may become impaired for any reason, steps should be taken immediately and before entry of a judgment liquidating backpay to protect the Agency's claim. See

[198] Many counties and local jurisdictions also require noncorporation businesses using any name other than the owner's to file an alias affidavit with their recording offices.